

Internal investigations: A basic framework for the compliance professional

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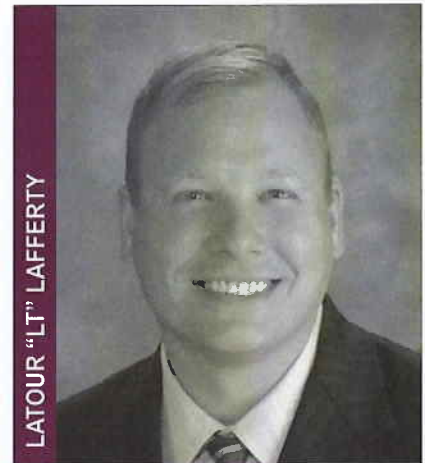
The authors will be presenting an internal investigations workshop at the 7th Annual Compliance & Ethics Institute in Chicago, September 14-17.

A major benefit of an effective compliance plan in your organization is the likely discovery of potential misconduct. Although potential misconduct may be discovered in a variety of ways other than the normal operation of your compliance plan, the critical issue is what to do about the potential problem once it has been brought to your attention. This essay will briefly outline the general

parameters of any internal investigation, a basic framework for the compliance professional. Of course, any investigative plan should be tailored for your specific problem after review and consultation, if necessary, with either in-house or external counsel who is experienced in planning and implementing internal investigations.

The threshold question of any internal investigation is identifying the purpose and goals of the investigation. The primary purpose of an internal investigation is to determine whether the alleged misconduct occurred and to take the appropriate remedial action. From a legal perspective, there is the additional purpose of protecting or mitigating the organization's exposure to potential liability. Therefore, the principle goal is to identify specific violations, if any, and take immediate corrective action to address them. A well-planned and executed internal investigation will also enable the organization to effectively defend, or "cooperate" with, a government enforcement action, as well as defend potential civil plaintiff actions. Investigative allegations of misconduct are also a matter of good corporate governance, and the results of the investigation could be used by your organization to address employee misconduct internally, refer a matter for criminal prosecution, or pursue a civil action against the employee and others to redress harm to the organization.

Second, it is important to plan the investigation before it is implemented. In this regard, several planning items should be addressed at the very beginning. For simplicity sake these can be categorized as the "who, what, when and how" of the investigation.



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Who is going to lead the investigation?

Answering this question requires you to keep in mind that it is paramount to develop and maintain the credibility of the investigation, which starts with the lead investigator. An investigation may be conducted by the internal compliance department, corporate counsel, the board of directors, or a special committee of the board, or counsel retained specifically for this purpose. The particular issue and its complexity, especially past involvement in the potential misconduct, potential motives and conflicts, as well as experience in conducting investigations are all factors that should be considered. Most importantly, however, is the fact that the credibility of the investigation is likely to be affected by these factors and the choice of investigator. The organization's paramount goal should be to ensure the complete objectivity and integrity of the investigation.

What should be investigated? Not every issue must be the subject of an internal investigation. Start by identifying and understanding the nature of the alleged misconduct, and immediately stop any questionable conduct until further review. Not every issue must be addressed at the board level, but when appropriate, the board should issue a resolution identifying and explaining the scope of the investigation. The goal is not to scrutinize all aspects of the organization's business activities

in an effort to ferret out potential wrongdoing; rather, an internal investigation should be issue-specific. Potential misconduct has been identified and that misconduct should be investigated. If additional issues are discovered, the scope of the investigation can be extended by the appropriate governing body, or not, depending on the circumstances. Regardless, the scope of the internal investigation should be clear, specific, and adhered to.

When should the investigation be conducted? Timing is critical to the success of an investigation. Responding quickly to allegations minimizes the risk for collaboration among potential witnesses and those perpetrating the alleged misconduct.

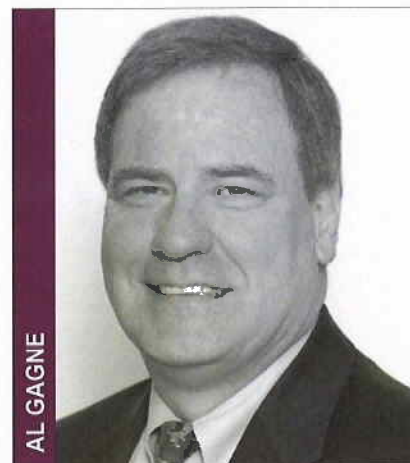
How should the investigation be conducted? It is imperative that the organization communicate with its employees and explain the nature of the investigation and the requirement that they cooperate with the investigation. In some cases, the employee may request and may be entitled to legal representation. It is imperative that the employees always be clearly informed that corporate or external counsel does NOT represent the employee. Ideally the organization will have policies in place that clearly identify an employee's responsibility for both reporting known or suspected violation and for cooperating with any internal or external investigation. The organization should define at the beginning when and to what extent counsel will either be retained for employees or employees indemnified for legal counsel, consistent with the organization's by-laws and applicable state law. Sometimes, it may be necessary to explain the need for confidentiality to witnesses and those alleged to have committed the misconduct. It may also be necessary to explain the meaning of attorney-client privilege, and that any violation of the confidentiality agreement may subject the employee to disciplinary action up

to and including termination, because such violation could compromise the outcome of the investigation.

From a legal perspective, essentially two types of evidence exist in any case, documents and witness testimony, and this evidence is the substance of all internal investigations. The scope of the investigation defines the outside parameters of the documentary evidence. It is important to identify these parameters and ensure that all documentary evidence within it is preserved through a document retention policy. The pertinent documents within this "universe" can be collected and reviewed as necessary. Likewise, all potential witnesses should be identified and interviewed as necessary. Further, both the potentially relevant documents and witnesses can be expanded as the investigation unfolds. The investigator should keep a precise record of all documents reviewed and witnesses interviewed.

Several special considerations come into play at this stage of the investigation. Most importantly, it is critical for the organization to not do anything that could be considered obstructive in nature. The people responsible for conducting the investigation should be careful when collecting documents to ensure that none are misplaced or destroyed. Further, the people conducting witness interviews should be careful to seek the truth and not leave the impression that they are trying to influence the employee's statements in any way. It is extremely important to have a witness accompany you on most interviews to corroborate not only the facts gathered during the interview, but to be able to attest to the objectivity and independence of the investigator.

In addition, all investigations need to be documented in some fashion, but it may not be advisable to fully document all witness interviews in a report that may be turned



AL GAGNE

over to the government as part of the organization's "cooperation." More importantly, this "road-map" may be discoverable by potential plaintiff's counsel and used against the corporation in a civil lawsuit. Although all investigations must be properly documented, you do not want to unnecessarily provide your adversaries with your work product. Also, consider the need to establish a policy for dealing with government investigators, in the unlikely event that they show up at your door with a search warrant or to ask questions related to a potential violation of which you may or may not be aware. Who is your company contact point for these visitors? You certainly want to cooperate, but you also need to consider the company's rights and those of your employees. It's advisable to have a plan in place to deal with this situation, if it arises.

Finally, special attention should be paid to the use of the attorney-client privilege in the investigation and internal or external counsel should be consulted on both the benefits of this privilege and how to ensure it is maintained.

The investigator must conduct the actual investigation, keeping in mind both the goals of the investigation and the nature of the alleged misconduct. Generally, all fraud investigations follow a few stages ranging

Continued on page 63

from general to specific information gathering. For instance, the investigation will start with the simple gathering and examination of pertinent documents. This document review will then be followed by third-party witness interviews and perhaps questionnaires. Third-party witnesses are employees and other witnesses who are not involved in the alleged misconduct. When the investigator has determined the broad scope of the misconduct, the investigator will begin to narrow the investigation through the collection of evidence either proving or disproving the alleged misconduct. The evidence may include specific documents, witness statements, or even surveillance and monitoring activities. Ultimately, the investigator will need to narrow the focus to interviewing all people involved in the alleged misconduct and finish by confronting the person or persons accused of committing the misconduct.

Once the investigation is complete, the investigative findings and recommendations should be reported to the appropriate body. This report may be either oral or written and is necessary for the governing body to consider

and make an informed decision regarding the business and legal options presented. The final report should identify the issue investigated, describe how the investigation was conducted, determine whether the allegations of misconduct are true, and whether any policies and procedures, as well as criminal offenses, are potentially implicated. However, it is not necessary for the investigator to make legal conclusions regarding whether or not the misconduct constituted a crime. That determination should be left to experienced counsel and should remain confidential. Even if inconclusive because the evidence is insufficient to verify the alleged misconduct, the report may nonetheless recommend a corrective action plan for improving the organization's business processes.

Finally, the end result of any internal investigation should be the implementation of the recommended remedial action. This remedial action may include employee discipline, training and education, or revisions to the organization's policies and procedures. In some cases, it may be necessary to report the misconduct to appropriate government regulatory agencies, but this should only be done after consulting

with counsel. If defrauded itself, the organization may consider pursuing its own civil action against the perpetrators to redress the injury. Internally, it may be advisable to generally explain the results of the investigation to the accused and the accuser, as well as to follow-up with the complainant to assure that there is no retaliation for making the complaint.

Without doubt, one goal of any organization's ethics and compliance program is to develop an effective program for the detection of potential misconduct. One sure sign of success is the actual detection of potential misconduct, which will necessitate that organizations conduct an internal investigation in most situations. Although each investigation must be tailored to the issue presented, after consulting with internal or external counsel, this basic framework should help the compliance professional in conducting an investigation.

For more information on planning and implementing an internal investigation, please join us for our workshop at the Society of Corporate Compliance and Ethics' (SCCE) annual Institute in Chicago this September. ■

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